

name on an exclusive basis (paragraph 28.d)? Another critical issue that the conditions should address is the imputation rule applicable when an SBC/Ameritech ILEC performs services on behalf of the affiliate.

- The discount for unbundled loops if SBC and Ameritech do not develop necessary OSS (paragraph 35) is inadequate. This is especially true since paragraph 40.b contemplates the SBC/Ameritech may not deploy nondiscriminatory OSS for four full years after closing. Until SBC/Ameritech develops and deploys satisfactory OSS, CLECs cannot as a practical matter offer advanced services to the mass market, whether or not they get a discount, so OSS deployment should be made a pre-condition. If the Commission chooses not to do so, it should make the discount far greater than 25 percent to compensate CLECs for the inability to execute pre-ordering and ordering functions in a reasonable and nondiscriminatory manner consistent with the requirements of section 251(c)(3). In addition, the discount should apply to non-recurring as well as recurring charges because there is no principled basis to treat the two types of charges differently. Finally, use of loops purchased at a discount should not be limited to exclude any provision of voice grade service (paragraph 34.c).
- The provision in paragraph 34 making CLECs completely ineligible for the OSS discount for even an isolated, innocent instance of non-compliance with the limitations illustrates the one-sidedness of the proposal. If CLECs get the “death penalty” in these circumstances, so should SBC/Ameritech: any violation of the separation requirements should result in the immediate loss of the proposed exemption from section 251(c) for the affiliate, and SBC/Ameritech should then comply with the unbundling and resale

requirements of section 251(c) even if provides advances services through a nominally separate affiliate.

- To accelerate competition and provide an incentive for SBC/Ameritech to provide line sharing on a nondiscriminatory basis, paragraph 33 should establish a date certain by which SBC/Ameritech must complete any actions that it contends are necessary to make line sharing technically feasible and to obtain associated equipment at commercial volumes. In fact, line sharing is technically feasible today, and any implementation problems can be addressed, if SBC and Ameritech so desire, more expeditiously. SBC/Ameritech's proposed right under paragraph 34 to provide line sharing on a discriminatory basis only to itself exacerbates the problem of SBC/Ameritech's undeserved competitive advantage — a problem that the nominal charges from one affiliate to the other do nothing to solve. Failure to provide nondiscriminatory line sharing on a timely basis should result in the loss of any right to provide it temporarily on a discriminatory basis.
- The Commission should establish an expedited procedure to resolve any issue about SBC/Ameritech's compliance with the separation requirements, and it should define self-executing remedies for such violations, including (as explained above) loss of the purported section 251(c) exemption. CLECs should have access to information, including allegedly "proprietary" information about compliance with performance measures (paragraph 37), useful in pursuing any complaint.
- The Commission should make clear that nothing in the separation provisions affects any obligation to pay reciprocal compensation for the exchange of Internet traffic,

notwithstanding any transfer of customers that are Internet service providers pursuant to paragraph 31.c or any other factor. The Commission should explain why some of the procompetitive requirements in paragraph 31 are “expressly contingent upon, the fact that the FCC has determined that Advanced Services used to provide Internet services are interstate services.”

- The Commission should clarify the kinds of modifications of rules and regulations that would “materially change the substance of what is covered” in Section VII within the meaning of paragraph 39.b(2).

VIII. SHARED TRANSPORT

This proposal represents another example of a condition that does not provide any public interest benefit because SBC and Ameritech merely propose to do something that they are already required to do by law.²⁹ Shared transport is critical for local exchange competition.³⁰ Ameritech has already unconscionably refused to provide shared transport, despite the fact that state commissions, this Commission and the Eighth Circuit have all found that Ameritech must

²⁹The proposal in fact offers nothing more than what Ameritech offered in its section 271 application for Michigan two years ago in 1997. Despite the Commission’s denial of that application, Ameritech apparently has done nothing in the last two plus years to address shared transport, a critical element needed for opening local markets to competition. *See* Affidavit of Daniel J. Kocher on Behalf of Ameritech Michigan In the Matter of Application of Ameritech Michigan Pursuant to § 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137 at ¶¶ 67 -78 (Ameritech will offer shared transport only according to billing settlement procedure to include specifically blended rates, true-up provisions, and netting of access).

³⁰*See* Comments of MCI WorldCom, Inc., at 62-67, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket 96-98) and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service* (CC Docket 95-185) (filed May 26, 1999).

provide shared transport to CLECs.³¹ SBC and Ameritech should not be rewarded with merger approval for compliance with existing legal obligations.

In light of Ameritech's abysmal history, the shared transport condition should be strengthened in several important respects:

- Paragraph 42 should not give Ameritech yet another year to offer shared transport. Ameritech does not need more time to provide a UNE that it has already refused to provide for too long. Nor does Ameritech need a year to provide shared transport on the same terms (except pricing) as its merger partner when SBC already offers shared transport in Texas. Given these facts, Ameritech can and should provide shared transport prior to merger close so that CLECs can finally start receiving shared transport in the Ameritech region without any additional delay.
- Paragraph 41.b should not allow for a netting or collection of access by SBC/Ameritech where an end-user customer is served by a CLEC. Once a CLEC buys any UNE, including but not limited to shared transport, the CLEC and not the ILEC has the exclusive right to provide service using that element. If, for example, the CLEC is using shared transport to provide switched access, SBC/Ameritech is no longer providing the access and should not have direct contact with the interexchange carrier to net access.

³¹ See *In the matter, on the Commission's own motion, to consider the total service long run incremental costs and to determine the prices of unbundled network elements, interconnection services, resold services, and basic local exchange services for Ameritech Michigan*, Case No. U-11280, 1998 Mich. PSC LEXIS 46, 183 P.U.R.4th 1 (Mich. Pub. Serv. Comm'n Jan. 28, 1998); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 12460 (1997); *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 § Ct. 879 (1998).

The interexchange carrier is the customer of the CLEC, and the CLEC, as the provider of the switched access service, should collect the associated access charges.

- Paragraph 41.c allows for a blending of shared and direct transport. SBC and Ameritech should explain, however, exactly how they will develop the shared transport rate. The current language is at best unclear. SBC/Ameritech should not include the rates for direct transport when they calculate the rates for shared transport; otherwise, double charges to the CLECs would result. The charge for shared transport should be the TELRIC cost of that facility.
- While paragraph 41.a requires Ameritech to withdraw its proposal at the Commission to establish a separate transit service rate, the condition must specifically require Ameritech to withdraw the proposal “with prejudice”. This ensures that SBC/Ameritech will not simply refile this proposal at a later time.

IX. OFFERING OF UNEs

This proposed condition, by its terms, does not improve the status quo. It simply provides that SBC and Ameritech will continue to abide by their prior commitments to provide UNEs during the pendency of the remand from the Supreme Court.³² Equally important, the condition does not provide any specific consequences for non-compliance, or even establish a procedure for the Commission to enforce this condition.

³²It is not clear how categorical are SBC’s and Ameritech’s commitments in the letters in Attachment D to abide by existing agreements. In these letters, SBC and Ameritech reserve the right to withhold UNEs if CLECs seek to change the status quo in unspecified ways.

A condition addressing the offering of UNEs would provide tangible benefits if SBC and Ameritech committed to provide specified UNEs (for example, unbundled loops and access to directory assistance information on a bulk basis), and combinations of UNEs, regardless of the outcome of the pending UNE remand proceeding. Another useful provision would be to ensure that CLECs that purchase UNEs from SBC/Ameritech obtain the same intellectual property rights that SBC/Ameritech has to these network elements.³³ The Commission could also require SBC and Ameritech to honor existing unbundling requirements established by state commissions (but not the Commission) — an issue that the letters in Attachment D do not address. But the proposed condition, which contains no new or different requirement, does nothing to offset the reduction in local competition that approval of the merger would cause.

X. COMPLIANCE WITH COMMISSION PRICING RULES

This proposed condition does nothing to increase the likelihood that, after almost three years of steadfast resistance to cost-based pricing, SBC and Ameritech will finally start to charge cost-based rates that comply with the Commission's rules and with the rules of the large majority of state commissions that adopted similar principles while the Commission's pricing rules were stayed by the Eighth Circuit. The Chief of the Common Carrier Bureau, and indeed the Commission itself, already have the ability to discuss with any ILEC, including SBC and Ameritech, any concerns about compliance with the Commission's pricing rules. The Commission can itself enforce those rules directly through section 208 complaint proceedings,

³³The issue is the subject of a pending Commission proceeding, *Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right to Use Agreements Before Purchasing Unbundled Elements*, CC Docket No. 96-98, CCB Pol.

and it can participate directly in state commission proceedings. Indeed, this proposed condition could *limit* the Commission staff's role by making SBC/Ameritech the staff's representative in state commission proceedings. If the staff has concerns that should be communicated to a state commission, one would surely expect the staff to communicate those concerns directly, and not to rely on the party whose conduct gave rise to those concerns.

Paragraph 44 would give the Bureau Chief the right to get documentation from SBC/Ameritech addressing these concerns. But it is unlikely that SBC/Ameritech would ignore a request for documentation from the Bureau Chief without this condition, and SBC/Ameritech could easily comply simply by providing the same materials that it submits in state commission proceedings that are likely to be underway addressing the same pricing issues.

A condition that would help to achieve compliance with the Commission's pricing rules would be very different. For example, such a condition would include SBC/Ameritech's agreement that the Commission itself would adjudicate complaints about violations of its own rules on a strict timetable under the Commission's expedited procedures. The condition would require SBC/Ameritech to comply with the Commission's geographic de-averaging rules and not to advocate any changes of those rules in state commission proceedings. Another option would be for the Commission to impose caps on the prices of specific recurring and non-recurring charges for UNEs, and to prohibit "glue charges" for combinations of UNEs.³⁴ The elimination of benchmarks caused by the merger could lead the Commission to adopt the "best practices" of

³⁴For example, SBC is now attempting in Oklahoma, Kansas, Missouri, and Arkansas to charge a grossly inflated price for directory assistance despite a requirement that it charge cost-based, nondiscriminatory prices and the Texas commission's finding that the proper rate is a fraction of the price that SBC is charging MCI WorldCom in the other SWBT states.

any current SBC or Ameritech ILEC, and in the case of pricing, that means that any SBC or Ameritech ILEC should charge a price no higher than the lowest price for a geographic zone charged by any other SBC or Ameritech ILEC. If one SBC or Ameritech ILEC can efficiently provide a UNE at that price, so should other SBC and Ameritech ILECs.

The condition proposed by SBC and Ameritech, however, is purely cosmetic. It would not produce any improvement in the excessive prices now demanded by SBC and Ameritech. MCI WorldCom agrees that it is crucial for the Commission to address the pricing issue because non-cost-based prices will cripple local competition, no matter how efficiently and smoothly OSS works. The proposed condition is no better than no condition at all.

XI. CARRIER-TO-CARRIER PROMOTIONS

The carrier-to-carrier promotions offered by SBC and Ameritech are yet another example of the “smoke and mirrors” approach they used in devising the proposed conditions. Essentially, the “promotions” boil down to this — the monopolist determines what services CLECs can sell (by prohibiting use of discounted loops for advanced services) and how much of those services CLECs can sell (by limiting the number of customers for which the promotional rates are available and the duration of the promotion). For numerous reasons, these proposed promotions would not substantially expand the ability of CLECs to compete against SBC and Ameritech:

- The low caps and restrictions associated with the promotions render any benefits insignificant. Paragraphs 46.g and 49 would allow CLECs to compete (for a limited and uncertain time) for only a small portion of the market using the promotional rate for unbundled local loops, the UNE platform, and resold services. These caps will likely be met well before the three-year term of the promotional period. So, in effect, the more

effective the discount in achieving its purposes, the sooner CLECs lose it, and the harder CLECs compete for market share, the fewer opportunities they have for capturing market share using the promotional rate.

- The promotional discount for unbundled loops in paragraph 46.d would apply only to recurring charges. But SBC and Ameritech offer no basis to treat non-recurring charges differently, and the excessive level of non-recurring charges could effectively moot a CLEC's ability to take advantage of the promotional rates. Bear in mind more generally that the discount may be calculated from rates that CLECs have challenged as grossly excessive and that may not even have been finally determined to be consistent with TELRIC methodology.
- The promotional discount for unbundled loops will be available for too short and too uncertain a period. Paragraph 46.d allows SBC/Ameritech to stop the "promotion" as soon as it gets section 271 authority in a state or as soon as it provides facilities-based service to only *one* customer in only 15 out-of-region markets. As a result, CLECs cannot make reliable business plans based on the availability of a discount which may be withdrawn at any time.
- SBC/Ameritech should not limit CLECs' ability to use unbundled loops purchased at the promotional rate to provide advanced services. The only effect of this unjustified restriction is to retard deployment of advanced services.
- The discount for UNE platforms should not be left to negotiation and arbitration, as paragraph 48.c provides. SBC/Ameritech's only incentive is to use negotiations to delay the start of arbitration, and arbitration of pricing issues has proven to be a protracted

process which ILECs use all of their opportunities to drag out and to increase the costs to CLECs of participation. Once again, the terms of this condition should be established before SBC and Ameritech transfer control of any license.

- Similarly, the ability to utilize the small number of unbundled loops offered at the discounted promotional rate is limited by the lack of any discount for collocation — and the failure discussed above to ensure that SBC/Ameritech comply with the Commission's existing collocation rules.
- SBC and Ameritech should not have flexibility to manipulate the availability of the discount for unbundled loops to particular lines, as paragraph 46.d would permit. SBC and Ameritech would doubtless act on their incentive to use this discretion to make the discount available where it is least likely to be used, and to deny it where it would have the most impact on competition.
- The timing of the promotion obligation makes it even less useful. CLECs have access to the discounted rate for three years, but SBC/Ameritech may not implement uniform and nondiscriminatory OSS for unbundled loops, combinations of UNEs, or resold services during that entire period, rendering the theoretical availability of the discount largely meaningless for mass market services.
- SBC and Ameritech make no claim, much less a showing, that the 32-percent discount for resold services will make resale a viable competitive option. Interestingly, this discounted rate is less than the rate offered to the CLEC that Ameritech touted as the poster child demonstrating the reasonableness of its resale rates: Chicago-based USN

Communications, Inc., negotiated a 35-percent discount with Ameritech but was forced in 1998 to file for bankruptcy and to abandon its “total service resale” strategy.³⁵

- The one-sidedness of the proposal is demonstrated by the power to deny a CLEC eligibility for the discount even for an unintentional or isolated violation of the strict eligibility limits. Yet while SBC and Ameritech are careful to put strict limits on consequences to them for their violations of the conditions that they formulated, any CLEC is punished by complete and immediate loss of rights for any mistake, no matter how insubstantial or inadvertent. Similarly, SBC and Ameritech grant themselves the right to audit compliance by CLECs (paragraph 48.d), but it is easy to predict their reaction if CLECs claimed the right to audit SBC/Ameritech’s performance. Compliance provisions should be reciprocal.

In the end, what SBC and Ameritech leave out of their proposed conditions is as important as what they include, and the missing elements effectively strip them of any practical utility.

XII. ALTERNATIVE DISPUTE RESOLUTION

MCI WorldCom does not object to giving CLECs the option to invoke the alternative dispute resolution procedure described in paragraph 50 and Attachment E. However, MCI WorldCom does not believe that this process offers sufficient net benefits over existing options that it is likely to be used very often or productively.

³⁵ See Erik Heinicke, *Troubles at USN Call into Question Viability of Local Resale at Current Discount Rates*, Telecommunications Reports, Sept. 14, 1998. See also Jon Van, *Ameritech’s Resale Poster Child Hits a Major Speed Bump*, Chicago Tribune, Nov. 5, 1998.

XIII. MOST-FAVORED-NATION PROVISIONS

MCI WorldCom strongly supports the basic principles embodied in paragraphs 51 and 52. Until now, SBC and Ameritech have steadfastly resisted this principle, thereby setting back the development of local competition. However, some of the proposed restrictions would mean that CLECs will still encounter delay when trying to invoke these provisions. In practice, requesting most-favored-nation treatment will simply start a lengthy negotiation process in which SBC and Ameritech would claim that it is not feasible to provide the requested interconnection arrangement or UNE because of state-specific issues or because it would somehow be inconsistent with state-specific policies. And of course, state-by-state negotiation of pricing would compound the difficulty of translating the principle into a working arrangement.

XIV. REGIONAL INTERCONNECTION AND RESALE AGREEMENTS

Here again, MCI WorldCom strongly supports the principle embodied in paragraph 53 — a principle that SBC and Ameritech have resisted despite repeated requests by MCI WorldCom for region-wide agreements. And here again, turning this principle into region-wide agreements is bound to be a costly, frustrating, and protracted process because SBC/Ameritech will continue to have the same incentive to resist such agreements.

XV. ADDITIONAL SERVICE QUALITY REPORTING

The service quality reporting conditions is another set of requirements that is unobjectionable but adds little of value. SBC and Ameritech should not wait for six months after the merger close to being to file the proposed reports. Indeed, they already have the ability to provide, and in some instances do provide, much of the information covered by the proposed

reports. The reporting should also include the quality of access services used to provide local services. *See* page 24 above.

XVI. NRIC PARTICIPATION

MCI WorldCom agrees that SBC/Ameritech should continue to participate in the Network Reliability and Interoperability Counsel (“NRIC”). However, this requirement does little good because the real question is not *whether* SBC/Ameritech participate, but *how* it participates and *whether* it implements NRIC recommendations promptly and completely. It is not practical for the Commission to police SBC/Ameritech’s day-to-day participation in NRIC and to ensure that SBC/Ameritech’s participation is constructive and reasonable. The Commission can and should require all SBC/Ameritech ILECs to speak with one voice and cast one vote, and the former SBC and Ameritech ILECs should not espouse different positions.

XVII. ARMIS REPORTING

MCI WorldCom has no comment concerning this proposed condition.

XVIII. ACCESS TO CABLING IN CERTAIN PREMISES

SBC and Ameritech should not merely conduct a cabling trial but should provide, on a permanent basis, nondiscriminatory access to cabling within MDUs and MTUs where they control the cables, and SBC and Ameritech should comply with this requirement before they close.

Despite the fact that the campus and riser cable should be considered part of the loop,³⁶ it is no secret that CLECs face significant challenges in gaining access to wiring in buildings for the provision of services. SBC and Ameritech should already be cooperating with CLECs with these matters and installing wiring in a way that permits CLECs a single point of interface. It should not take SBC and Ameritech 6-12 months to begin trials that last for a year (paragraph 57.e). There are no technical feasibility issues associated with reconfiguration and access to wiring that cannot be easily and quickly resolved with good-faith ILEC cooperation. Nor is there any justification for the three-year limit in paragraph 58, which creates uncertainty that deters CLECs from providing service to MDUs and MTUs pursuant to the rights provisionally granted by this condition.

In addition, the condition should not provide for CLECs to pay "actual costs" instead of TELRIC rates for recabling and reconfiguration of the wiring. SBC and Ameritech should also be responsible maintaining the wiring at no additional fee to CLECs.

XIX. INTERLATA PRICING

MCI WorldCom has no comment concerning this proposed condition, except (as noted above) the fact that inflated access charges are not a real cost to SBC/Ameritech when it originates or terminates interLATA calls in-region makes it easier for SBC/Ameritech than for unaffiliated interexchange carriers not to impose minimum monthly or flat-rate charges.

³⁶See Comments of MCI WorldCom, Inc., at 46-47, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket 96-98) and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service* (CC Docket 95-185) (filed May 26, 1999).

XX. ENHANCED LIFELINE SERVICES

MCI WorldCom has no comment concerning this proposed condition.

XXI. OUT-OF-REGION LOCAL SERVICES

The Commission staff has proposed a set of conditions that purport to establish some minimum substantive and timing requirements for SBC/Ameritech's entry into local markets outside its region. The fact that the staff concluded that these conditions are necessary is itself highly significant. The staff correctly recognized that SBC/Ameritech's incentive to carry out its so-called "National Local" strategy is suspect. The merger offers no significant public interest benefits unless it produces far more out-of-region competition than SBC or Ameritech individually would initiate without the merger. But the Commission can have no confidence that the merger will have this result. If marketplace conditions do not create adequate incentives for a company to make the substantial investments necessary to be a competitive facilities-based local exchange carrier, the Commission cannot supply these incentives through a regulatory set of conditions.

However, the conditions proposed by SBC and Ameritech would not generate any significant benefit. What is most striking is how minimal they are. Indeed, it is not at all surprising that these conditions are acceptable to SBC and Ameritech because they are so easy to meet. For example, despite the fact that SBC and Ameritech have been planning their "National Local" strategy for over a year since the merger was announced, paragraph 61.b(3) would give SBC/Ameritech a *minimum* of 2½ years to complete initial deployment of local services in all 30 out-of-region markets, and it could be longer if SBC/Ameritech continues to delay compliance with section 271. SBC/Ameritech would satisfy this leisurely requirement by installing one

switch and offering service to *one* business and *one* residential customer. Notably, the proposed condition does not require any deployment of transmission facilities, perhaps the most expensive part of facilities-based entry. Then SBC/Ameritech would have another year to collocate in only 10 wire centers (paragraph 61.c(3)) and to offer local service to a group of business and residential customers. The proposed offering requirement is meaningless because it does not specify the terms of the offer; for example, SBC/Ameritech could charge more for local service than the ILEC and apparently satisfy this requirement. Nor does this condition require SBC/Ameritech to continue to offer local services for any significant period of time. Starting with only a fraction of SBC's and Ameritech's experience in providing local service, and enjoying none of SBC's and Ameritech's monopoly profits, several CLECs have moved far more quickly than SBC/Ameritech plans to act to satisfy this condition.

Although the weakness of the underlying conditions makes the lack of self-executing remedies relatively unimportant, it is worth noting that the cap on payments for non-compliance with these already meager provisions limits the price that SBC/Ameritech must pay to renege on its much-touted out-of-region entry promises.

XXII. VERIFICATION OF COMPLIANCE

MCI WorldCom has no objection to the proposed compliance program — and no illusions that it will make a difference. The existence of such a program will not significantly increase the likelihood that SBC/Ameritech will comply with the proposed merger conditions.

Several changes, however, can and should be made to improve the audit process:

- SBC/Ameritech's authority to select the auditor should be circumscribed. The same problems arises here as with the collocation audit (as explained above): a company that

had a substantial role in designing key systems and processes under review cannot be considered “independent,” even if it was not “instrumental” in designing “substantially all” these systems and processes.

- The auditor should have an obligation, not an option, to notify the Audit Staff if access is not timely provided pursuant to paragraph 62.d(3). The auditor should also be required to discuss SBC/Ameritech’s compliance with wholesale customers. *See* page 26 above.
- The Commission should establish a procedure for a party that disagrees with the auditor’s findings to submit its objections and for the Commission to adjudicate the issues on an expeditious basis. Paragraph 62 should specify the terms and conditions on which interested parties may get access to the working papers and supporting materials of the auditor, subject to appropriate confidentiality protections. The SBC/Ameritech proposed compliance plan and preliminary audit requirements do not appear to warrant “confidential treatment” under paragraph 62.b and 62.d(1).
- Failure to comply with the verification provisions should trigger the imposition of specified sanctions.
- Compliance and audit reports should be prepared more frequently than annually because problems can arise more often and any problems need to be addressed immediately. In practical effect, an annual audit means that any violation may well go undetected and uncorrected for much longer over two years because SBC/Ameritech has nine months after the year covered by the audit to submit the final audit report (paragraph 62.d(5)), and only then will any significant scrutiny of the findings begin.

XXIII. ENFORCEMENT

MCI WorldCom wholeheartedly endorses the principle in paragraph 63 that “[t]he specific enforcement mechanisms established by these Conditions do not abrogate, supersede, limit, or otherwise replace the Commission’s enforcement powers under the Communications Act.” However, the Commission should spell out more clearly what that principle means, especially in light of Bell Atlantic’s position that the Commission has no jurisdiction to enforce the conditions imposed in connection with the Bell Atlantic-NYNEX merger. The conditions should therefore include an express acknowledgment by SBC and Ameritech that the Commission has authority and jurisdiction to enforce these merger conditions. The Commission should also explicitly confirm that these conditions do not affect its authority, and its obligation, to adjudicate complaints pursuant to section 208 of the Communications Act. For example, SBC/Ameritech’s failure to comply with the Commission’s collocation, UNE, or pricing rules under the proposed merger condition would not prevent any victim of this violation of the Commission’s rules and sections 251(c) or 252(d) of the Act to file a complaint pursuant to section 208.

The conditions should also make clear that they do not limit or affect the authority of state commissions to adjudicate disputes about SBC/Ameritech’s compliance with federal or state legal requirements that state commissions have jurisdiction to enforce. Here again, the lack of substance in the proposed conditions concerning collocation, UNEs, and pricing illustrates the need to preserve the authority of those state commissions that have been pushing ILECs to live up to their obligations under the Act and the Commission’s regulations. The continuing role of state commissions in moving SBC and Ameritech toward reasonable, efficient, and

nondiscriminatory OSS needs to be recognized. Conversely, CLECs should have the option to pursue remedies with either this Commission or state commissions.

The enforcement section should also provide for payments for violation of those conditions for which no specific non-compliance payment is provided. SBC and Ameritech profess to agree to conditions that are “self-executing,”³⁷ and failure to comply with any condition ought to have automatic and immediate consequences. Furthermore, to increase both the deterrent and compensatory function of the conditions, SBC/Ameritech should pay the attorneys’ fees and other costs (including expert witness fees) incurred by their opponents in any enforcement proceeding where their opponents substantially prevail.

Paragraph 64 permits the Commission, “at its discretion,” to extend the effective period of a condition for a period that does not exceed any period of non-compliance. However, any condition with which SBC/Ameritech does not comply should be automatically extended for the period of non-compliance. Such an extension should not be optional at the Commission’s discretion; it should be mandatory. At the very least, the Commission should adopt a very strong presumption that any condition shall be extended for the period of non-compliance except in extraordinary circumstances.

Finally, and at least equally important, the modification provision in paragraph 67 should be changed substantially. First, the standard for a waiver of the deadlines imposed on SBC/Ameritech should be spelled out: no extension of these deadlines waiver should be granted except for an extraordinary change in circumstances. SBC/Ameritech should bear a heavy

³⁷SBC-Ameritech *Ex Parte* Letter, at 2 (July 1, 1999).

burden if it seeks an extension of any deadline. Otherwise, these deadlines will be gutted, CLECs will not be able to rely on them in their business planning, and the Commission will be inundated with waiver requests. For example, as paragraph 61.e and 65 provide in limited circumstances, other deadlines should be extended only if SBC/Ameritech demonstrates that compliance was rendered impossible or infeasible by a force majeure event or Act of God.

Second, any modification authority should work both ways: if the Commission has authority to grant modifications sought by SBC/Ameritech, it should have authority to grant modifications sought by the intended beneficiaries of the conditions if they do achieve their intended result in their initial form. The broader the Commission's authority to make modifications requested by SBC/Ameritech, the broader its authority to make procompetitive modifications consistent with the original purpose of the conditions.

XXIV. SUNSET PROVISIONS

There should be no automatic sunset of any of the conditions. Whether the conditions continue to fulfill their original purpose or have outlived their usefulness cannot sensibly be decided at this time. The result of any such approach will inevitably be that the conditions will end too early or too late. The Commission should periodically make a case-by-case determination based on competitive conditions in the local marketplace as it evolves. The Commission should review the continuing need for the conditions three years after any closing and every two years thereafter, consistent with the biennial review requirement of section 11(a) of the Communications Act, 47 U.S.C. § 161(a). Because the conditions are critical to the development of local competition in SBC and Ameritech's regions, the burden in these periodic

review proceedings should be on SBC/Ameritech to prove that the conditions are no longer useful.

If the Commission (in our view, mistakenly) decides to adopt an arbitrary sunset date, it should, at a minimum, make four important changes:

- First, the term of any condition with which SBC/Ameritech is not required to comply before closing should begin when SBC/Ameritech first achieves compliance. If it takes SBC/Ameritech one or two or even three years to achieve compliance, SBC/Ameritech should be required to comply with the condition for a minimum period thereafter; otherwise, the eventual compliance will be of little or no benefit to the intended beneficiaries of the condition, and SBC/Ameritech will in effect be rewarded for their delay in compliance.
- Second, any fixed term should be longer than three years. Two years after the Commission imposed conditions on the Bell Atlantic/NYNEX merger, Bell Atlantic is still out of compliance.
- Third, the Commission should retain the authority to extend any condition if the circumstances that initially justified the condition continue to exist. Its authority to extend the conditions should not be limited by SBC/Ameritech's failure to comply with the conditions, as paragraph 68 currently provides.
- Fourth, for the reasons explained on pages 62-63 above, any condition with which SBC/Ameritech does not comply should be automatically extended for the period of non-compliance.

XXV. EFFECT OF THE CONDITIONS

As currently drafted, paragraph 69 is unclear and could be abused by SBC/Ameritech to evade procompetitive conditions imposed by the Commission. At a minimum, the Commission should more clearly define when a merger condition imposed by it is “substantially related” to a merger condition imposed under state law. SBC/Ameritech should not have an open-ended, unilateral ability to avoid a merger condition simply because CLECs have somehow invoked rights under state law. In general, unless federal and state merger-related provisions are inconsistent, SBC/Ameritech can and should comply with both. It should be up to the CLEC to decide whether to invoke the federal or the state provision.

Paragraph 70 would unjustifiably circumscribe the Commission’s public interest review under section 271(d)(3)(C). Especially since many of the proposed conditions do not go significantly beyond SBC/Ameritech’s obligations under section 251(c) and the competitive checklist in section 271(c), the Commission should at least have the discretion to consider their possible expiration, and the likelihood that SBC/Ameritech will withdraw offerings that have proven their procompetitive value. The continuing role of the conditions is directly and substantially relevant to whether SBC/Ameritech’s entry into the in-region interLATA market would be in the public interest. SBC/Ameritech cannot have it both ways: SBC and Ameritech will surely want the Commission to consider these conditions in deciding whether to grant a section 271 application, and so they cannot reasonably object to Commission consideration of the expiration of the conditions. To the extent the conditions’ presence has a positive effect on the development of local competition, their absence will have a negative effect that the Commission is duty-bound to consider as part of its public interest analysis.

CONCLUSION

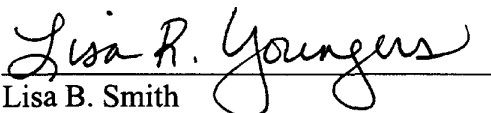
No set of conditions can adequately offset the substantial harms to the public interest that the merger of SBC and Ameritech would cause. If the Commission nevertheless decides to grant conditional approval to the merger, it should substantially strengthen the conditions proposed by SBC and Ameritech as explained in these comments.

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ATTACHMENT 1



MEASUREMENTS AND PERFORMANCE STANDARDS

ILEC LOCAL SERVICE QUALITY

Version 1.0

National Carrier Policy and Planning
Based on LCUG Version 7.0 and State Collaborative Activities
June 1, 1999